

Real Property, Financial Services, & Title Insurance Update: Weeks Ending August 10 & 17, 2018

August 18, 2018

Real Property Update

- **Foreclosure/Loan Modification:** foreclosing plaintiff was required to allege and prove default of loan modification agreement after trial court found the loan modification to be the operative agreement. [Pijuan v. Bank of America, N.A.](#), No. 3D16-1553 (Fla. 3d DCA Aug. 8, 2018)(affirmed).
- **Condo Law:** master association comprised of numerous sub-condominium associations (each responsible for the operation of their own condominium property) was not a condominium association subject to chapter 718. [Dimitri v. Commercial Center of Miami Master Association, Inc.](#), No. 3D16-2549 (Fla. 3d DCA Aug. 8, 2018)(affirmed).
- **Lease Renewal:** lease option to renew, for a time certain, at "then prevailing market rate for comparable commercial office properties" was indefinite as to material term of price and, therefore, unenforceable. [Jahangiri v. 1830 North Bayshore, LLC](#), No. 3D17-529 (Fla. 3d DCA Aug. 8, 2018)(affirmed).
- **Foreclosure/Redemption:** junior lien holder could not redeem portion of mortgage in consideration for release of portion of property encumbered, and was required to pay all amounts outstanding to satisfy priority lien and redeem. [Bankers Lending Company, LLC v. Jacobson](#), No. 5D17-542 (Fla. 5th DCA Aug. 10, 2018)(reversed).
- **Adverse Possession:** following default, titleholder could assert, and trial court was required to consider, failure to state a cause of action defense where claimant failed to allege he was in possession of the property for seven years, as required under section 95.18, Florida Statutes. [Bank of America, N.A. v. Eastridge](#), No. 5D17-2541 (Fla. 5th DCA Aug. 10, 2018)(reversed and remanded).

Financial Services Update

- **FCRA:** dismissing claim under 15 U.S.C. § 1681s-2(b) where plaintiff failed to allege sufficient facts to support a reasonable inference that credit union received a notice of dispute from a consumer reporting agency, and ruling that related defamation and negligence claims were preempted - *White v. Navy Fed. Credit Union, et al.*, No. 18-cv-00402 (S.D. Cal. Aug. 3, 2018).
- **FDCPA:** dismissing as untimely claim based on lack of legal right to foreclose under section 15 U.S.C. §1692f, because plaintiff had constructive notice of recorded deed - *Bushlow v. MTC Financial*, No. 17-cv-06771 (N.D. Cal. Aug. 7, 2018)
- **FDCPA:** denying motions to dismiss arguing complaint did not state a claim because Second Circuit recently joined other circuits in recognizing a foreclosure action can be an attempt to collect a debt - *Cortes-Goolcharran v. Rosicki, Rosicki & Assocs.*, No. 17-cv-3976 (E.D.N.Y. Aug. 7, 2018)
- **TCPA:** in light of ACA, interpreting definition of an autodialer "as we did prior to the issuance of 2015 Declaratory Ruling," and holding that an email SMS service was not an autodialer because it did not have the present capacity to randomly or sequentially generate telephone numbers and dial those numbers" - *Dominguez v. Yahoo, Inc.*, No. 17-1243, 2018 WL 3118056 (3d Cir. June 26, 2018)
- **TCPA:** reversing district court for adopting the FCC's broader understanding of the term "capacity" in determining whether the system used to call the plaintiff was an autodialer. "[T]he term 'capacity' is best understood to refer to the functions a device is currently able to perform, whether or not those functions were actually in use for the offending call, rather than to devices that would have that ability only after modifications." "That definition does not include every smartphone or computer that might be turned into an autodialer if properly programmed, but does include devices whose autodialing features can be activated... by the equivalent of 'the simple flipping of a switch'" - *King v. Time Warner Cable, Inc.*, No. 15-2474 (2d Cir. June 29, 2018)
- **RESPA:** reversing in part the dismissal of a complaint that alleged lender violated RESPA and Regulation X, where it allegedly did not respond to borrower in writing as to whether borrower's loss mitigation application was complete or incomplete prior to proceeding with foreclosure; district court erred in concluding there needed to be an enforceable agreement and in applying Florida's litigation privilege. *Yeh Ho v. Wells Fargo Bank, N.A.*, 2018 WL 3082822, No. 17-11918 (11th Cir. June 21, 2018)
- **FDCPA:** dismissing with prejudice FDCPA claim because foreclosure is not a "debt collection activity," and the claim did not fall within the "narrow exception" that exists when the foreclosure also seeks payment of the underlying promissory note. *El Hassan v. Liberty Home Equity Solutions, Inc.*, No. 17-22435, 2018 WL 3134418 (S.D. Fla. June 26, 2018)

- **FDCPA:** holding law firm was engaged in "debt collection activity" where it issued a writ of special execution in an effort to collect homeowner association fees as part of a judicial foreclosure scheme that allowed for deficiency judgments. [McNair v. Maxwell & Morgan PC](#), No. 15-17383, 2018 WL 3097153 (9th Cir. June 25, 2018)
- **FCRA:** plaintiff could not demonstrate as a matter of law that the servicer's reporting of her mortgage account as "past due" and "delinquent" during a forbearance plan was inaccurate or incomplete sufficient to succeed on her FCRA claim, as the plan did not legally modify note and mortgage and thus had no bearing on the accuracy of the information the servicer reported to the credit reporting agencies. [Felts v. Wells Fargo Bank, N.A.](#), 2018 WL 3130674, No. 16-16314 (11th Cir. June 27, 2018)

Title Insurance Update

- **CPL:** a closing protection letter defines an assignee as one who provides funds, instructions or documents to the issuing agent or approved attorney at closing, therefore will not protect an assignee who was not a party to the original loan transaction who did not provide funding, instruction or other documents at closing - [PennyMac Holdings, LLC v. Fidelity Nat'l Title Ins. Co.](#), No. 72538 (Nev. July 30, 2018) (affirming dismissal of CPL claim)
- **Timely Notice:** condition 3 of lender's policy requiring prompt notice of claim necessitates actual knowledge by insured that a particular matter has an adverse effect on the insured title, a factual issue which is not resolvable on a motion to dismiss - [PennyMac Holdings, LLC v. Fidelity Nat'l Title Ins. Co.](#), No. 72538 (Nev. July 30, 2018) (remanding for determination of actual knowledge)

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